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FOREWORD: THE MYTH AND REALITY OF FEDERALISM

*Charles L. Black, Jr.**

In May 1977, I attended, at Ditchley Park near Oxford, a conference aimed at bringing out whatever contribution our own experience with federalism might have to make to a wise solution of the British problem of “devolution” — a word that is currently a term of art referring to the possible creation of semi-autonomous assemblies or parliaments for Scotland and Wales. The challenge of correctly and helpfully describing our own federalism to able British civil servants and politicians stimulated me to what were (to me) new, or at least more accurate insights into our system.

How should one start to describe our allocations of power between nation and state, when one is dealing with foreign people? I concluded that, as with so many matters, the best start was a good simple approximation, flagged as an approximation only, and with the promise, speedily to be redeemed, of truing this approximation up with further qualifications.

What is the best simple approximation, the “ $\pi = 3$ ” approximation, to the division of power in our federalism? I concluded it was this: (1) The national power — call it “Congress” for short, is omnicompetent; it may deal with any subject. (2) The state powers — call them the “legislatures” — are also omnicompetent; they too may deal with any subject. (3) If Congress does deal with a subject or with a question, its dispensations prevail over those of any legislature.

Remember, a British M.P., desiring to know the practical truth about our federalism, is not primarily interested in how we got there — by the taxing power, the commerce power, or however. He wants to know where we are.

Now how would one proceed to improve this approximation? One would have to state, I think, two general constraints, on the legislatures and on Congress respectively. First, no state may do anything that significant-

* Sterling Professor of Law, Yale University.

ly impedes the operation of the national government or of any of its instrumentalities, or that significantly impairs the reality of unitary nationhood. (Here, again, the Britisher wants to know where we are, not how we got there; he would only be puzzled by the bizarre chain of non-reasoning which, for example, uses the commerce clause as support for the evidently correct holding that California may not make criminal the bringing in of one's down-on-his-luck brother-in-law.)¹ Second, Congress is not to break in too much upon the *internal* workings of the state governments as governments. (I don't know how you could state the principle more precisely, but the recent *Usery* case² reminds us that it still has life. The subjection of state Governors to confirmation by the United States Senate would have been evidently instrumental to national interest, in the days of the civil rights struggle, but no one even thought of such a step.)

Now the difficulties with using these principles as aids to forming a pattern for Scotland and Wales, are, I think, quite insuperable. The ongoing definition of their content rests on a tradition. This tradition changes with time, as living traditions must, and it is, like all complex traditions, quite vague on the periphery, but we have, at least, some notion of the "done thing" — to use the British phrase — as to the interference of these governments with one another. The British have no living tradition as to the "done thing" with respect to a relationship between the Westminster Parliament and a Scottish National Assembly newly called into being. To make *each* of these omnicompetent, as we have done in respect of the corresponding relation, would be to set up the beginning of conflict, with no guides to its resolution, even its approximate resolution.

What about *political* mediation of this conflict? Our States are — as Herbert Wechsler has so brilliantly shown³ — kept in health by their political ties with Senators and Congressmen and with the President. In any imaginable Westminster Parliament, England would so outnumber Scotland that only occasional, *ad hoc* balance-of-power politics would protect the Scottish quasi-national government. On the other hand, a device like our Senate, where state equality prevails, would be quite impossible, for England could hardly be expected, in any legislative chamber, to accept being outvoted two to one by Scotland and Wales. It is probably true that you needed a good number of states to ensure an

1. *Edwards v. California*, 314 U.S. 160 (1941).

2. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

3. H. WECHSLER, *The Political Safeguards of Federalism*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 49 (1961).

adequate shifting and reshifting of alignments in the Senate. When this failed, and alignments hardened around one issue, we fought each other in the greatest war, by any measure, up to its time.

Then how about enumerating the powers of the Scottish assembly, thus changing my first or " $\pi = 3$ " approximation by making the local body less than omniscient? Insofar as the American experience speaks to that, it says that "enumeration of powers" is on all fronts, judicial and practical, a failure. Either you make the powers so general that they can be used for anything, or you make them too narrow for need. Our actual national government illustrates the first of these things; the pretty certain guess, as to what that government would have been like, with all its powers as specific as the patents power, illustrates the second.

At this point I concluded, and conclude, that American federalism is non-exportable. There is too much in it of the "done thing", the not always express or always expressible sense of what is about right. I could not give much to my British cousins, though I did learn a good deal from them. Some of this learning was target-of-opportunity learning.

For example, a highly placed British civil servant spoke passionately in favor of something much more radical than the mere restoration of some of their medieval autonomy to Scotland and Wales. He wanted to divide all of Britain into *regions* — something like the Italian *regioni*. His reason was simple and single: He said that the burden of management and decision on a huge variety of matters was becoming unbearable to the London Government, and that some large responsibilities must be parcelled out elsewhere if that Government was not to stagger and fall. His tone was one of near-desperation, and I think his near-despair was realistic.

I thought, then, of one enormous advantage, in our federalism, one that is not often attended to. The state governments *are* omniscient; no plea of mere *ultra vires* can prevail against them. To Congress, this has the immense meaning that Congress need *never* deal with a subject simply because it must be dealt with somehow, and nobody else is empowered. Each state can, and does, fill in for felt need. Congress is thus free to pursue national priorities at a pace less than frantic, with the confidence that all housekeeping that is thought needful can be and will be done by somebody else. Automatically — and this is a really striking feature — those things "left to the States" will automatically tend to be those wherein national uniformity is not for the moment needful, and where variety may thus have play. But Congress can, when this position changes, take up and deal with any matter — for Congress (to a Britisher who simply wants to know the factual position, and not how we got there) is omniscient; the

simple plea of *ultra vires* can, in theory, be interposed to its actions, but that plea never wins anymore. The distribution of power between States and nation is thus *politically mediated from time to time*, in obedience to the time's feeling of need.

I noted, too, that the British participants in the conference talked much less about *power*, in its archetypal criminal-law sense, than they did about the division of responsibility for delivering services, and of the financing of these. I thought at that point of the work of Kenneth Dam, and of the title of his path-breaking article, a title that captures the whole theme and sets the mind on a new track: *The American Fiscal Constitution*.⁴ We ought to think more, for example, about the fact that the existence of the states, and their performance of what we look on as their conventional functions, is made possible now only by massive financial support from the federal fisc. (I ought to say that I have been much instructed on these matters by my students in seminar.)

Yet mythology works with great power. It has visibly worked with us. How often is the talk of the "Compact Among Sovereign States" shaped by recognition of the plain fact that rather more than two-thirds of our States fit the formula only mythologically, having been formed by Congress out of Territories already belonging to the United States? What did Wisconsin get for surrendering its "sovereignty"? Just the same as Texas got. Here is a myth, but reality would be very different — probably intolerable — without this myth.

So, again, American federalism is non-exportable, for myths cannot be exported. The hope for the British is that they will happen upon their own usable myth, their own version of the "done thing" in a relation altogether new. But I am glad I went to Ditchley. Chesterton toured the world in order to get back to Pimlico.

This symposium, a valuable part of a commentary that must go on as long as the American republic stands, will explore, at closer range, some of the aspects of the working out of our myth in an ever-changing reality.

4. Dam, *American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).